



UNITED STATES SUPREME COURT

UNITED STATES OF AMERICA

Versus

MORRIS HARRIS

NUMBER **76-1857**

PETITION FOR CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

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REPORTS OF OPINION BELOW

The decision of the Court of Appeal, Fifth Circuit, is reported at ___F.2d___, number 76-4051.

STATEMENT OF JURISDICTIONAL GROUNDS

This court is authorized to review the judgment in question by Writ of Certiorari. U.S. Code, Title 28, Section 1254(1).

TABLE OF CASES

1. 18 U.S.C., §922(a)(1).
2. Federal Rules of Evidence, Rule 803(10).
3. U.S. vs. Dota, 482 F.2d 1005 (10th Cir.) cert. denied, 414 U.S. 1071, 94 S.Ct. 583, 38 L.Ed. 2d 477 (1973)

QUESTIONS PRESENTED FOR REVIEW

1.

May a conviction stand when the only evidence of an essential element of the crime is admitted in evidence over objection and in violation of Rule 803(10), Federal Rules of Evidence?

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. 18 U.S.C. §922(a)(1)

§922. Unlawful acts

"(a) It shall be unlawful-
(1) for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms or ammunition, or in the course of such business to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce;"

2. Federal Rules of Evidence, 803(10)

"Rule 803. Hearsay Exceptions;

Availability of Declarant

Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence of nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in

the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry."

STATEMENT OF THE CASE

Morris Harris was charged by indictment with being a dealer in firearms without being licensed to do so. He was tried on August 13, 1976. In order to prove an essential element of the offense charged in the indictment, defendant's not having a license to deal in firearms, the Government offered a certificate of an agent of the Alcohol, Tobacco and Firearms Division of the Treasury Department. The agent did not

claim in the certificate that "a diligent search" had been made for the certificate. Rule 803(10) of the Federal Rules of Evidence is predicted upon a "diligent search" for a record being necessary to prove non-existence of the record. Defendant objected to the admission of the certificate for the express reason that it did not comply with Rule 803(10) and was thus inadmissible hearsay. The trial Court overruled the objection, defendant was convicted, the conviction affirmed, and rehearing denied. A copy of the Court of Appeals decision is attached as Appendix 1 to this petition. Rehearing denied May 26, 1977.

ARGUMENT

Rule 803(10) is specific. The

certificate to show absence of a fire-arms dealer's license did not state that a diligent search had been made. It did not even state that a search was made. In U.S. vs. Dota, 482 F.2d 1005 (CA 10) cert. denied, 414 U.S. 1071, 94 S. Ct. 583, 38 L. Ed. 2d 477 (1973), relied on by the Fifth Circuit, at least a search had been made.

To say that the evidence as offered was "in its mature highly reliable" as did the Fifth Circuit, is to beg the question. It is only "highly reliable" if it is in compliance with the law, written to exclude unreliable hearsay. the certificate is not in compliance with Rule 803(10), and is therefore unreliable hearsay and inadmissible. The objection should have been sustained, the conviction should have been reversed.

CONCLUSION

The Government is bound by its own laws. The conviction must be reversed.

By Attorney:

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I certify 2 copies of this petition has been mailed to the Solicitor General of the United States and to the United States Attorney, Middle District of Louisiana, this ____ day of June, 1977.

Ralph Brewer

UNITED STATES of America,
Plaintiff-Appellee,

v.

Morris HARRIS, Defendant-Appellant.

No. 76-4051

Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

April 27, 1977.

Defendant was convicted in the United States District Court for the Middle District of Louisiana at Baton Rouge, E. Gordon West, J., of engaging in the business of dealing in firearms without a license, and he appealed. The Court of Appeals held that the trial court properly admitted into evidence a certificate from an agent of the Bureau of Alcohol, Tobacco and Firearms Division of the Department of Treasury stating that defendant had not been granted a license to engage in business as a firearms dealer, despite the fact that the certificate did not state that a diligent search of records had been made.

Affirmed.

Criminal Law ¶429(1)

Trial court properly admitted into evidence, in prosecution for engaging in business of dealing in firearms without license, certificate from agent of Bureau of Alcohol, Tobacco and Firearms Division of Department of Treasury stating defendant had not been granted license to engage in business as firearms dealer, despite fact that such certificate

did not state that diligent search of records had been made. Federal Rules of Evidence, rules 803(10), 902; 18 U.S.C.A. § 922(a)(1).

Appeal from the United States District Court for the Middle District of Louisiana.

Before COLEMAN, GODBOLD and TJOFLAT, Circuit Judges.

PER CURIAM:

Appellant was convicted of engaging in the business of dealing in firearms without a license, 18 U.S.C. § 922(a)(1).

This circuit already had held that § 922(a)(1) is not unconstitutionally vague. *United States v. King*, 532 F.2d 505 (CA5, 1976).

The only other issue appellant raises concerns the admission into evidence of a certificate from an agent of the Bureau of Alcohol, Tobacco and Firearms Division of the Department of the Treasury stating that appellant had not been granted a license to engage in business as a firearms dealer. Appellant contends that admission of this certificate violated Rule 803(10) of the Federal Rules of Evidence because the certificate did not state that a diligent search of records had been made. Rule 803(10), an exception to the hearsay rule, provides:

Absence of public record or entry.

—To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office

* Rule 18, 5 Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

or agency, evidence in the form of a certification in accordance with rule 902,¹ or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

The certificate by the agent stated in relevant part:

I do hereby further certify that Morris Harris, 4154 Pitcher Street, Baton Rouge, Louisiana, has not been granted a license to engage in business as [a] dealer in firearms other than destructive devices or ammunition for other than destructive devices as of February 24, 1976.

Although there is no statement in the certificate that a "diligent search" had been made, we think this omission does not cause the admission of the certificate to be reversible error. We agree with the Court of Appeals for the Tenth Circuit which, in a similar case, said:

There has been substantial compliance with the rule, and reversing this case simply because the certificate failed to

recite the word "diligent" would protect no substantial right of appellant and would indicate nothing but a total capitulation to form over substance.

United States v. Dota, 482 F.2d 1005 (CA10), *cert. denied*, 414 U.S. 1071, 94 S.Ct. 583, 38 L.Ed.2d 477 (1973); *accord*, *United States v. Farris*, 517 F.2d 226 (CA7), *cert. denied*, 423 U.S. 892, 96 S.Ct. 189, 46 L.Ed.2d 123 (1975).²

The exception to the hearsay rule embodied in Rule 803(10) is justified because evidence admitted under it is in its nature highly reliable, i.e., the "yes or no" of whether a license has been issued; because the records from which the evidence comes are open to the public thereby increasing the probability that any errors will be found and corrected; and because there is a substantial need for such evidence. See generally 5 Wigmore on Evidence §§ 1631-32, 1678(7) (Chadbourn rev., 1974). The justifications for this exception have been met in this case.

AFFIRMED.

1. The government complied with Rule 902.
2. *Dota* and *Farris* were decided before the effective date of the Federal Rules of Evidence under Federal Rule of Criminal Procedure 27

and Federal Rule of Civil Procedure 44. However the provision of a "diligent search" is also in Rule 44 and thus the principle involved is the same.